Supreme Court, U.S.
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No. 97-1147

In the
Supreme Court of the United States
October Term, 1997

STATE OF MINNESOTA,
Petitioner,

vs.

WAYNE THOMAS CARTER, AND
MELVIN JOHNS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITIONER'S BRIEF ON THE MERITS

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42 pp

QUESTIONS PRESENTED

Whether an invitee into a residence, whose sole purpose for being present is to assist the resident in an illegal activity, has a legitimate expectation of privacy while in the residence under the Fourth Amendment to the United States Constitution.

Whether a police officer's non-enhanced use of his natural senses to observe criminal activity in a residence from a common area outside the curtilage of the residence is a search under the Fourth Amendment to the United States Constitution.

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OPINIONS BELOW

The opinion of the Minnesota Supreme Court in *State v. Carter* (J.A., infra., pp. A1-A28)[1] is reported in 569 N.W.2d 169 (Minn.1997). The opinion of the Minnesota Supreme Court in *State v. Johns* (J.A., infra., pp. B1-B2) is reported in 569 N.W.2d 180 (Minn.1997). The opinion of the Minnesota Court of Appeals in *State v. Carter* (J.A., infra, pp. C1-C8) is reported at 545 N.W.2d 695 (Minn.App.1996). The opinion of the Minnesota Court of Appeals in *State v. Johns* (J.A., infra pp. D1-D5) is unpublished. The opinions of the District Court (J.A., infra, pp. E1-E17) are unreported.

JURISDICTION

The Minnesota Supreme Court filed its opinions in both cases on September 11, 1997. The Minnesota Supreme Court's judgment on Respondent Carter was entered on September 29, 1997. Upon motion of Respondent Johns, the Minnesota Supreme Court entered his judgment on October 1, 1997. The Petition For Writ of Certiorari was filed with the United States Supreme Court on December 29, 1997. The Petition For Writ of Certiorari was granted on March 9, 1998. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1257(a)(1997).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution:

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable

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[1] "J.A." refers to Joint Appendix.

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF CASE

A. Statement of Facts.

On May 15, 1994, at approximately 8 p.m., Officer Jim Thielen of the Eagan Police Department, while working stationary radar patrol, was approached by an individual with information regarding illegal drug activity. (J.A., infra, p. G7) The individual, whom the officer had never met before, told the officer that he/she had just walked by a nearby apartment window and observed people sitting around a table in the apartment "bagging" a white powdery substance. The individual also advised Officer Thielen that he/she believed the occupants of the apartment were using a blue four-door Cadillac with Illinois license plates which was parked in the apartment complex parking lot. (J.A., infra, pp. G9-G10)

Upon receiving the above information Officer Thielen immediately went to the apartment complex. Officer Thielen approached the apartment which was on the lower level of the building. The officer, while standing on a common grassy area within 12 to 18 inches of the apartment window, was able to look through a gap in the window blinds which were covering the window. Upon doing so Officer Thielen

observed two males and one female sitting at a kitchen table. The officer observed one of the males place a white powdery substance onto the kitchen table. This person passed the substance to the second male who placed the powder in a plastic bag. The second male in turn gave the plastic bag to the female who cut off the ends of the bag and put it on a pile located on the kitchen table. Officer Thielen observed the operation for approximately 10 to 15 minutes during which time 5 or 6 bags were filled. (J.A., infra, pp. G11-G14)

After making the above observations Officer Thielen left the apartment complex. Upon returning to his original location he had a second conversation with the individual who had initially reported the illegal drug activity in the apartment. During this second conversation the individual advised the officer that he/she believed the occupants of the apartment also had a gun. (J.A., infra, G15) Officer Thielen returned to the apartment complex parking lot and located a blue Cadillac with Illinois plates. (J.A., infra, G16-G17) After locating the Cadillac, Officer Thielen returned to the fire station. Officer Thielen contacted Investigator Kevin Kallestad of the South Metro Drug Task Force and told him of the initial report and his subsequent observations. Investigator Kallestad advised Officer Thielen that he would attempt to obtain a search warrant for the apartment and the Cadillac. Investigator Kallestad instructed Officer Thielen to stop and secure the Cadillac should anyone attempt to drive away in it while he was attempting to obtain the search warrant. (J.A., infra, pp. G17-G20)

At approximately 10:30 p.m., a police officer observed two males putting items into the above Cadillac. The two males got into the vehicle and drove away. Police officers stopped the vehicle a short distance away. Police identified the driver of the vehicle as Respondent Carter. The passenger of the vehicle was identified as Respondent Johns. Police ordered both men out of the Cadillac. As police opened the

passenger door to let Johns out they observed in plain view a black zipper pouch and a hand gun on the floor the vehicle. (J.A., infra, pp. G20-G23) Both Carter and Johns were placed under arrest and the Cadillac was towed to a Eagan Police Department where it was eventually searched after officers obtained a search warrant for the vehicle and the apartment. While officers were executing the search warrant on the Cadillac they found cocaine in the black pouch, identification papers for Johns, pagers and a duffel bag containing a digital scale with trace amounts of cocaine. (T., pp. 39, 44-45)[2]

Officers also executed the search warrant on the apartment. At the time the lessee of the apartment, Kimberly Thompson, was present. Officers found cocaine residue on the kitchen table and baggies similar to those found in the Cadillac. (J.A., infra, pp. G1-G2) Officer Thielen was able to identify Carter, Johns and Thompson as the same individuals he had observed through the window bagging cocaine. (J.A., infra, pp. G21-G22) Through subsequent identification officers were able to determine that both Carter and Johns were residents of Chicago, Illinois. (J.A., infra, pp. G3-G6)

On May 17, 1994 the respondents were charged with the crimes of conspiracy to commit controlled substance crime in the first degree pursuant to Minnesota Statutes §§ 152.021, subd. 1(1) and 609.05 (1994)(conspiracy to possess with the intent to sell 10 or more grams of a mixture containing cocaine) and controlled substance crime in the first degree aiding and abetting pursuant to Minnesota Statutes §§ 152.021, subd. 2(1) and 609.05 (1994)(aiding and abetting another to possess 25 grams or more of a mixture containing cocaine.)

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[2] "T." refers to transcript of September 21 and 22, 1994 suppression hearing.

B. How the Federal Question Was Presented.

Both respondents moved the trial court to suppress their statements and all evidence seized from the vehicle and apartment. Respondents argued that Officer Thielen's observations through Thompson's apartment window were an unreasonable search under the Fourth Amendment. Respondents went on to argue that because of the unconstitutional nature of Officer Thielen's actions, any evidence derived from such observations should also be excluded.

The trial court determined that respondents did not have standing to object to the Officer Thielen's observations into the apartment of Kimberly Thompson. The trial court concluded both respondents failed to present evidence of an expectation of privacy in the apartment based upon "understandings that are recognized and permitted by society." *Order Pursuant to Omnibus Hearing*, quoting *Rakas v. Illinois*, 439 U.S. 128, 143-44 n.12 (1978)(J.A., infra., pp. E4 and E8) In reaching its decision the trial court explained that the only evidence presented by the defense showed that the respondents were out-of-state residents who had been at the apartment for a period of time on May 15, 1994. The trial court also concluded that Officer Thielen made his observations from an area in which the respondents had no reasonable expectation of privacy. *Id.* (J.A., infra., pp. E8-E9) The respondents proceeded to trial on stipulated facts and were found guilty of both offenses.

Both respondents appealed their convictions to the Minnesota Court of Appeals challenging the lawfulness of Officer Thielen's observations through the apartment window. The appeals were reviewed by two separate panels of judges. In regard to Respondent Carter, the Minnesota Court of Appeals held that Carter did not have standing to object to the officer's observations as his claim that he was predominately a

social guest is "inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose--to package drugs." *State v. Carter*, 545 N.W.2d 695, 698 (Minn.App.1996)(J.A., infra. p. C6). In regard to Respondent Johns, a second judicial panel of the Minnesota Court of Appeals did not determine the issue of standing, holding that such a determination was unnecessary, as under the totality of the circumstances the officer's conduct was part of a logical in-the-field investigative technique to which the courts give deference because there existed sufficient probable cause to believe that criminal activity would be observed in the apartment. *State v. Johns*, unpublished, (J.A., infra., pp. D4-D5)

Respondents appealed the decisions of the Minnesota Court of Appeals regarding the lawfulness of Officer Thielen's observations to the Minnesota Supreme Court. The Minnesota Supreme Court, in a 4 to 3 decision, specifically held that under the Fourth Amendment of the United States Constitution and related state constitutional provisions, both respondents had standing to challenge the legality of Officer Thielen's observations.[3] In its decision the Court reasoned that although society does not recognize as valuable the task of packaging cocaine for distribution, society does recognize

[3] The Minnesota Supreme Court has in the past adopted the practice of specifically stating if its decision is to be based on independent state constitutional provisions. See, *State v. Scales*, 518 N.W.2d 587 (Minn.1994)(requiring under the Minnesota Constitution that all custodial interrogations be electronically recorded) and *In re E.D.J.*, 502 N.W.2d 779, 781 (Minn.1993)(rejecting the United States Supreme Court's opinion in *California v. Hodari*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) on state constitutional grounds). When a state court decision appears to rest primarily on federal law and when the adequacy and independence of any possible state law is not clear from the face of the opinion a reliance on federal law is presumed absent a clear statement by the state court to the contrary. *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476 (1983).

as valuable the ability of people to invite others into their residences to conduct a common task free from government intrusion, which created a legitimate expectation of privacy for respondents in the apartment of their co-conspirator. The Court also concluded that Officer Thielen took extraordinary measures when he approached within 12 to 18 inches of the apartment window and looked between a gap in the window blinds. Thus the Court held the Officer Thielen engaged in an unreasonable search which violated the respondents' expectation of privacy in the apartment. The Minnesota Supreme Court reversed the decisions of the lower courts. *State v. Carter*, 569 N.W.2d 169, 178 (Minn.1997)(J.A., infra, pp. A12-A24) and *State v. Johns*, 569 N.W.2d 180 (Minn.1997)(J.A., infra, p. B1).

SUMMARY OF ARGUMENT

The purpose of the Fourth Amendment is to protect a person's legitimate privacy interests against unreasonable intrusions by the government. The Amendment was not created for purposes of protecting criminals or making a person's residence a safe haven for criminal activities. Fourth Amendment rights are personal in nature and may not be vicariously asserted. Consequently, visitors cannot rely upon their host's privacy interest in a residence to establish a protected privacy interest under the Fourth Amendment. Each criminal defendant must establish standing to object to a search when the defendant attempts to invoke the controversial exclusionary rule.

The Minnesota Supreme Court wrongly focused its attention upon the relationship of the respondents to the leaseholder rather than upon respondent's relationship to the place searched. If the Minnesota Supreme Court's decision in this case is affirmed, all that will be necessary for a defendant to demonstrate standing is that he is present at the time of the

search and engaged in a common task with the property possessor. The practical effect will be automatic standing. Such a ruling is clearly wrong and should be reversed.

To determine whether a person has a legitimate privacy interest protected under the Fourth Amendment, one must first establish that the person had a subjective expectation of privacy in the area searched and, secondly, that this subjective expectation of privacy is one that society is prepared to recognize as reasonable. To reach these conclusions, a balancing test based upon the totality of the circumstances is properly utilized. Even if a subjective expectation existed, it is constitutionally protected only if it is one society would believe is reasonable. The Minnesota Supreme Court concluded that engaging in a common task with a leaseholder, even if illegal in nature, has a societal value and thus confers by itself standing to challenge a search under the Fourth Amendment. This ignores the totality of the circumstances approach and is clearly wrong.

Respondents in this case failed to present any evidence that they used this apartment for any intimate activities normally associated with a dwelling. They presented no evidence that they had any ownership rights or other property interests in the apartment. They presented no evidence demonstrating any prior contacts with the apartment or that they had any personal effects therein. They presented no evidence regarding their ability to control access to the apartment. All they established is that they were present and engaged in a criminal conspiracy with the leaseholder.

While this Court has previously determined that a person's presence on the premises with the consent of one in lawful possession is a factor to consider, it is clear that the mere fact that one is legitimately on the premises does not by itself control whether a protected privacy interest exists under the Fourth Amendment. Engaging in a common task with the owner or leaseholder of a residence is only one factor to

consider under the totality of the circumstances test. There is no overwhelming societal interest in this factor alone, as is being an overnight guest in the home of another, that renders all other inquires moot for purposes of establishing standing to challenge a search under the Fourth Amendment. Clearly the nature of the common task engaged in must be looked to, and when such task is illegal, as it is in this case, it cannot confer standing by itself. No one in society is willing to accept drug dealing as a reasonable activity worthy of protection. The Minnesota Supreme Court's analysis is contrary to reason, common sense and the interests of society. The ruling also significantly extends the application of the exclusionary rule to the detriment of justice. Respondents should not be granted standing under the Fourth Amendment as a shield to their unlawful activities.

The actions of the police here did not amount to a search protected under the Fourth Amendment. A non-enhanced observation from a common area outside the curtilage of a residence is not a search under the Fourth Amendment. The Minnesota Supreme Court's analysis improperly focuses upon the physical acts the officer took to reach his vantage point for observation, rather than upon the location from which the officer made his observations. This erroneous analysis by the Minnesota Supreme Court opens the door for courts to find varying degrees of privacy interests dependent upon what extraordinary measures an officer took to obtain his/her vantage point. What may constitute extraordinary acts to one may not be extraordinary to another. Such an analysis will result in an inconsistent application of the Fourth Amendment and an inconsistent application of the exclusionary rule to the detriment of societal interests in serving justice.

The ruling of the Minnesota Supreme Court, if allowed to stand, will compromise clear, long-standing Fourth Amendment principles. This Court must reverse the decision

of the Minnesota Supreme Court, reinstate the convictions and reiterate Fourth Amendment doctrinal foundations.

ARGUMENT

I. RESPONDENTS HAVE NOT ESTABLISHED A LEGITIMATE EXPECTATION OF PRIVACY IN THE RESIDENCE OF A CO-CONSPIRATOR WHERE THE SOLE PURPOSE FOR BEING PRESENT IS TO ENGAGE IN ILLEGAL ACTIVITY.

A. The Minnesota Supreme Court has allowed respondents to vicariously assert the privacy rights of another contrary to relevant decisions of the United States Supreme Court.

It has long been established that criminal defendants must identify their personal privacy interests and not the privacy interests of co-conspirators or third parties to seek protection under the Fourth Amendment: "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 966-967, 22 L.Ed.2d 176 (1969).

In the case at hand the Minnesota Supreme Court has determined Carter and Johns had a legitimate expectation of privacy, protected under the Fourth Amendment, in the apartment of a co-conspirator. The Minnesota Supreme Court erroneously concluded that the relationship between the property possessor and the person asserting the privacy interest (even if criminal in nature) will control whether an invitee will have a legitimate privacy interest. According to the Minnesota Supreme Court:

> As the [United States Supreme] Court has carefully noted, arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like do not control. *Jones*, 362 U.S. at 266, 80 S.Ct. at 734. What does control, however, is the nature of the relationship between the property possessor and the person alleging the privacy interest in the property. If the relationship is the type that society recognizes as valuable, then we will find standing. If it is not, then we will not. Although society does not recognize as valuable the task of bagging cocaine, we conclude that society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal activity.

Carter, supra, 569 N.W.2d 169, 176 (Minn.1997)(J.A., infra, p. A18).

This ruling, if allowed to stand, will let a guest or invitee stand in the same shoes as the owner or leaseholder of the property for purposes of determining whether the guest or invitee has standing to challenge a search under the Fourth Amendment. Visitors cannot rely upon their host's privacy interest in a residence to establish a protected privacy interest under the Fourth Amendment. Such a position not only is inconsistent with this Court's prohibition against the vicarious assertion of Constitutional rights, but also significantly reduces a defendant/invitee's burden of demonstrating a personal privacy interest in the area searched. If the Minnesota Supreme Court's decision is affirmed, all that will be necessary for a defendant to demonstrate is that he is present at the time of the search and engaged in a common task with the property possessor.

The Minnesota Supreme Court's ruling will inappropriately change the focus of a suppression hearing

from the defendant's/invitee's relationship to or privacy interest in the residence to the defendant's relationship with the property possessor. This is clearly inappropriate and inconsistent with the totality of the circumstances test utilized by this Court which appropriately focuses upon the defendant's relationship to the premises. See, *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). The Minnesota Supreme Court's analysis is also inconsistent with its own prior Fourth Amendment ruling in *State v. Richards*, 552 N.W.2d 197 (Minn. 1996), where it determined that a defendant who leased a storefront in the name of a corporation, but merely used the premises to store items of a non-personal nature, did not have standing to contest the search of the storefront although he had told others he intended to operate a business from the storefront, cleaned the storefront, covered windows and installed a lock. In this prior case, the Minnesota Supreme Court properly considered the relationship of the defendant to the premises in concluding the defendant lacked standing to challenge a search therein.

Proof problems will also exist should this Court affirm the decision of the Minnesota Supreme Court and allow defendants to base the legitimacy of their privacy interest solely upon engaging in a common task with a co-conspirator. How will the prosecution be able to secure the testimony from the host concerning the host's privacy interests in the area searched if the common task were illegal in nature? Surely, the host would have the unassailable right to assert their Fifth Amendment privilege against self-incrimination. Therefore, this Court should reverse the decision of the Minnesota Supreme Court and adhere to its long standing principle that Fourth Amendment rights are personal in nature and focus its attention on the activities of Respondents Carter and Johns and their relationship to or privacy interest in the premises or area searched. *United States v. Salv*ucci, 448 U.S. 83, 86, 100 S.Ct. 2547, 2550, 65 L.Ed.2d 629 (1980); *Rakas v. Illinois*,

439 U.S. 128, 133, 99 S.Ct. 421, 425, 58 L.Ed.2d 387 (1978); *Brown v. United States*, 411 U.S. 223, 230, 93 S.Ct. 1565, 1569, 36 L.Ed.2d 208 (1973) and *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 966-967, 22 L.Ed.2d 176 (1969).

B. Under the totality of the circumstances Carter and Johns have not established a legitimate expectation of privacy in the apartment of a co-conspirator.

Since its landmark decision in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) this Court has consistently applied a two part analysis in determining whether an individual has standing to object to an unreasonable search under the Fourth Amendment. The first consideration is whether the defendant by his conduct has exhibited a subjective expectation of privacy. The second consideration is whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable. *Smith v. Maryland*, 442 U.S. 735, 741-742, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979). Under the facts presented in this case, Respondents Carter and Johns have not proven that they had a subjective expectation of privacy in the apartment in question because of the existence of a gap in the window blinds through which Officer Thielen made his observations. Even if such a subjective expectation of privacy existed, it will be constitutionally protected only if it is one society would believe is reasonable or legitimate. It has long been the position of this Court that the burden is upon the defendant to present sufficient evidence which clearly demonstrates that society is prepared to recognize defendant's expectation of privacy as reasonable or legitimate. *United States v. Salvucci*, 448 U.S. 83, 86, 100 S.Ct. 2547, 2550, 65

L.Ed.2d 619 (1980) and *Jones v. United States*, 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed.2d 697 (1960).

Respondents Carter and Johns seek Fourth Amendment protection for their illegal activities in the apartment of a co-conspirator. On occasion an individual may have a legitimate or reasonable expectation of privacy in areas owned or lawfully possessed by third parties. *Rakas v. Illinois*, supra, 439 U.S. at 142, 99 S.Ct. at 430, 58 L.Ed.2d 387 (1978). However, this Court and the Minnesota Supreme Court have acknowledged that "arcane distinctions developed in property and tort law between guests, licenses, invitees, and the like do not control." *Jones v. United States*, 362 U.S. 257, 266, 80 S.Ct. 725, 733-734, 4 L.Ed.2d 697 (1960) and *Carter*, supra, 569 N.W.2d at 176 (Minn.1997) (J.A., infra, p. A18).

Since *Rakas v. Illinois*, supra, this Court has properly applied a balancing test based upon the totality of the circumstances in determining the legitimacy of the defendant's privacy interest under the Fourth Amendment. This Court has not identified any particular factor as controlling. Facts and circumstances which this Court has considered include: the nature and purpose for which the area searched was used, whether the defendant was present at the time of the search, whether the defendant owned the premises or had other property interests in area searched, whether defendant regularly visited the area or had spent a considerable amount of time in the area, actions of the defendant to exclude access to the area by third parties, the ability of the defendant to exclude others from the area searched, societal values or interests in protecting the privacy interest and the intent of the Framers of the Fourth Amendment. See, *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990); *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987); *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984);

Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973); *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); *Mancusi v. DeForte*, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); and *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).[4]

In the case at hand, Carter and Johns have not presented any evidence of ownership or other property interest in the apartment. Respondents have not presented any evidence demonstrating any prior contacts with the apartment or that they had spent considerable time at the apartment. Carter and Johns have not presented any evidence that they had personal effects within the apartment or any evidence regarding their ability to control access to the apartment.[5] Most importantly, Carter and Johns have not demonstrated that the activities that

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[4] The totality of the circumstances approach applied by the United States Supreme Court to standing issues is consistent with its approach to related Fourth Amendment issues. See, *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (sufficiency of probable cause to issue search warrant), *Schneckloth v. Bustmonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (voluntariness of consent to search), *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct.1868, 20 L.Ed.2d 889 (1968) (justification for stop and frisk).

[5] After the suppression hearing had concluded Respondent's attorney filed an affidavit alleging that he was aware that a set of keys were in possession of Carter at the time he was arrested which contained a key to the apartment. (J.A.., infra, pp. H1-H2) However, there is nothing in the record to support Carter's claim that he had a key to the apartment and the State has never stipulated to defense counsel's assertion in this regard. It is also clear that this was not a consideration of the trial court or any Minnesota appellate court. The Minnesota Supreme Court based its decision only upon the fact that Carter was present and engaged in a common task with the leaseholder at the time of the search.

they were engaged in were intended to be protected by the Fourth Amendment.

All that Respondents Carter and Johns have established is that they were present and engaged in a criminal conspiracy with the leaseholder. Every Court which has reviewed this case has confirmed this factual finding. The trial court concluded:

> No evidence was presented at the hearing that the defendant had lived at this apartment long term, was an overnight guest or was related to the leaseholder. The only evidence presented showed that the defendant was a resident of Chicago, Illinois and had been present at the apartment for a period of a few hours on May 15, 1994, during police observations.

Order Pursuant to Omnibus Hearing, (J.A., infra, p. E7).
The Minnesota Court of Appeals concluded:

> Carter's claim that he was predominately a social guest in the apartment is inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose—to package drugs.

State v. Carter, 545 N.W.2d 695, 698 (Minn.App.1996) (J.A., infra, p. C6).
The majority of the Minnesota Supreme Court concluded:

> . . . it is undisputed that Carter failed to produce any evidence that he was a "guest" of Thompson's, let alone an "overnight guest."

State v. Carter, 569 N.W.2d 169, 174-175 (Minn.1997)(J.A., infra, p. A15).

The dissenting opinion of the Minnesota Supreme Court concluded:

> Here, Carter established nothing beyond the fact that he was present in Thompson's apartment for a period of 2 ½ hours. He introduced no evidence that he had any prior relationship with Thompson, that he had ever been to her apartment before the night of his arrest, that he had personal effects in the apartment, that he had a key to the apartment, that he could invite or exclude others, or that he had any connection with the apartment other than his presence at the time of the search. The record is simply void as to any indicia that Carter was anything more than a brief, transient visitor.

Id., 569 N.W.2d at 180 (Stringer, J., dissenting, joined by Keith, C.J. and Blatz, J.) (J.A., infra, p. A27)

The purpose of the Fourth Amendment is to protect a person's legitimate privacy interests against unreasonable intrusion by the government. *Katz v. United States*, 399 U.S. 347, 350-351, 88 S.Ct. 507, 510-512, 19 L.Ed.2d 576 (1967). The Amendment was not created for the purpose of protecting criminals or making a person's residence a safe haven for criminal activities. It therefore becomes the responsibility of the courts to balance one's subjective expectation of privacy with the privacy interests the Fourth Amendment was designed to protect. *Rakas v. Illinois*, 439 U.S. 128, 140, 99 S.Ct. 421,429, 58 L.Ed.3d 387 (1978).

The Minnesota Supreme Court acknowledges the proper test of standing under the Fourth Amendment, in holding that:

> ...the person must establish only that under the totality of the circumstances, the person's subjective expectation [of privacy in the location searched] was

> the type of expectation that "society" is prepared to recognize as "reasonable."

Carter, supra, at 175 (J.A., infra, P. A15)

However, it has clearly misapplied this test under the facts of this case. The Minnesota Supreme Court, primarily relying on *Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990), reasoned that the ability of a property possessor to invite others into a residence to engage in a common task free from government intrusion has social value which in turn creates a constitutionally protected privacy interest. *Carter*, supra, at 176 (J.A., infra, p.A18) However, for the very reason that this Court determined that overnight guests have a legitimate expectation of privacy in the residence of another, this Court should reject the decision of the Minnesota Supreme Court in the instant case.

In *Minnesota v. Olson*, supra, this Court concluded that an "overnight guest" has a legitimate privacy interest protected by the Fourth Amendment. Justice White in delivering the opinion of the Court explained:

> To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a long-standing custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that society recognizes that a house guest has a legitimate expectation of privacy in his host's home.

Id., 495 U.S. at 98, 110 S.Ct. at 1689, 109 L.Ed.2d 85 (1990). It is clear from the above language in *Olson* that the nature and purpose for a person's presence is a consideration which courts should examine in determining the reasonableness of a defendant's privacy interest under the Fourth Amendment. Yet, the Minnesota Supreme Court has totally ignored this important analysis by deeming irrelevant the illegal nature of the activity and focusing only upon the fact that Carter and Johns were involved in a common task with the apartment's owner.

The Minnesota Supreme Court has reached the absurd conclusion that although society does not consider the packaging of narcotics for illegal sale as valuable, it does recognize as an important societal interest one's ability to do so in the premises of another in concert with the owner or leaseholder. *Carter*, supra, at 176 (J.A., infra, p. A18). As noted above, no facts have been established by respondents here other than that they were present for the sole purpose of engaging in unlawful activity with the apartment's resident. Society clearly should not be prepared to recognize this conduct as reasonable. The Minnesota Supreme Court's conclusion that engaging in a common task, be it legal or illegal, with a property owner or leaseholder is something society values or recognizes as "reasonable," thereby conferring by itself standing under the Fourth Amendment, ignores the totality of the circumstances approach and is clearly wrong. This Court should not abandon the well-reasoned "totality of the circumstances" approach which is true to the fidelity and purposes of the Fourth Amendment by affirming the conclusion reached by a simple majority of the Minnesota Supreme Court.

The only implication which can be drawn from the facts that Carter and Johns were present and engaged in a common task with the apartment's leaseholder at the time of the search

is that they were invitees into the apartment and nothing more. Where the record shows an invitee was in a residence only for purposes of engaging in criminal activity, the protections of the Fourth Amendment have never been extended by this Court. Persons are not always invited into a residence for lawful purposes or reasons which serve societal interests. Recognizing a legitimate privacy interest under the Fourth Amendment upon the mere showing that one was present in a residence with the consent of the owner or leaseholder and engaged in a common task with their host, should be rejected as overly broad and inconsistent with the fundamental purposes of the Fourth Amendment. Such a ruling is tantamount to re-establishing the "legitimately on the premises" standard first articulated in *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), but later rejected. See, *Rakas*, supra, 439 U.S. at 142-145, 99 S.Ct. at 429-433, 58 L.Ed.2d 387 (1978).

The Minnesota Supreme Court has in essence created a "bright line" rule concerning standing under the Fourth Amendment based only upon consensual presence and engagement in a common task with the property possessor. This Court has previously engaged in a debate regarding whether a case by case examination of the "totality of the circumstances" should be replaced with "bright line" rules that define the applicability of the Fourth Amendment. See, *Rakas*, supra, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (Rehnquist, opinion of the Court, Powell, J., concurring, joined by the Chief Justice)(White, J., dissenting joined by Brennan, J., Marshall. J., and Stevens, J.). In its debate, this Court has been mindful of the wide variety of circumstances upon which persons may find themselves in the residence of a third party. In rejecting the axiom that mere legitimacy of a person's presence at the location searched provides protection under the Fourth Amendment, the Court explained:

> . . . we are not forsaking a time-tested and workable rule, which has produced consistent results when applied, solely for the sake of fidelity to the values underlying the Fourth Amendment. Rather, we are rejecting blind adherence to a phrase which at most has superficial clarity and which conceals underneath that thin veneer all of the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment.

Id., 439 U.S. at 147. 99 S.Ct. at 432, 58 L.Ed.2d 387 (1978). This Court should not establish presence and relationship with the property owner or leaseholder as the controlling factors upon which a legitimate privacy interest will rest in the mistaken belief it will clearly define protected privacy interests of individuals in the residences of third parties.

The existence of a common task relationship with one in lawful possession of a premises does little to clarify the extent of one's privacy interest in an area lawfully possessed by another. For example, would defendants have a legitimate expectation of privacy in other areas associated with the premises, such as bedrooms, storage areas or areas immediately surrounding the premises which defendants had never visited? If not, would the legitimacy of the privacy interest change if a defendant knew that the areas were being used to store or manufacture items in furtherance of the common task or conspiracy? Would a defendant have the same legitimate expectation of privacy if third parties, such as roommates or acquaintances that were not part of the conspiracy, were present or had access to the area? Would a defendant be allowed to assert the protections of the Fourth Amendment if the leaseholder/co-conspirator had left a few minutes before the search and the defendant remained and continued to engaged in acts in furtherance of the common

task or conspiracy? Would a defendant retain a protected privacy interest if at the time of the search he was engaged in a common task with an overnight guest or other invitee of the property owner or leaseholder that was not aware of the illegal activity? Recognizing the variety of circumstances in which a person may be present in the areas subjected to a government search, a more conscientious approach in determining the applicability of the Fourth Amendment is to examine the totality of the circumstances on a case by case basis. *Rakas*, 439 U.S. at 147, 99 S.Ct. at 432, 58 L.Ed.2d 387 (1978).

Carter and Johns have failed to present any evidence that they had used the apartment for those intimate activities and privacy normally associated with a dwelling. Instead the evidence clearly indicates the sole purpose for their presence inside the apartment was to engage in the illegal possession and packaging narcotics for future sale. Society does not accept drug dealing as a reasonable activity worthy of protection. The illegal possession and distribution of drugs destroys family relationships, friendships, and the lives of people in this country on a daily basis. The fact that an invitee may be engaged in a common task with the owner or leaseholder of a residence may properly be one factor for consideration under the totality of the circumstances for purposes of Fourth Amendment analysis. However, there is no overwhelming societal interest in this factor alone, as there is in being an "overnight guest" in the home of another, that renders all other inquiries moot for purposes of establishing standing under the Fourth Amendment. Clearly the nature of the common task engaged in is worthy of inquiry in this analysis, and when such common task is illegal in nature, as it is in this case, it cannot be regarded as conferring such standing in and of itself. The Minnesota Supreme Court has chosen to ignore the illegal nature of the common task under the belief that society values protecting the ability of a resident to engage in a common task with an invitee under any

circumstances. This position is contrary to reason and common sense and does not represent a true reflection of society's values. It should be rejected by this Court.

The Fourth Amendment was designed to protect privacy interests within a dwelling that are important and valuable to society. It was not designed to protect criminal activity. Having presented no evidence of activity normally associated with a dwelling or legitimate privacy interests, respondents' attempt to seek protection of the Fourth Amendment for their illegal activities in the apartment, on the sole grounds that they were present in a dwelling and engaged in a common task with their co-conspirator, should fail.

C. The Minnesota Supreme Court's decision significantly expands the application of the exclusionary rule to the detriment of justice.

Evidence obtained in violation of the Fourth Amendment may be excluded at trial. *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). However, this Court has repeatedly observed that an unfettered application of the exclusionary rule is detrimental to our society and our system of justice:

> The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or

> convicted on the basis of all the evidence which exposes the truth. Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected.

Rakas v. Illinois, 439 U.S. 128, 137, 99 S.Ct. 421, 427, 58 L.Ed.2d 381 (1978) quoting *Alderman v. United States*, 394 U.S. 165, 174-175, 89 S.Ct. 961, 967, 22 L.Ed.2d 176(1976). See also, *United States v. Ceccolini*, 435 U.S. 268, 275, 98 S.Ct. 1054, 1059, 55 L.Ed.2d 268 (1978); *Stone v. Powell*, 428 U.S. 465, 489-490, 96 S.Ct. 3037, 3050, 49 L.Ed.2d 1067 (1976); and *United States v. Calandra*, 414 U.S., 338, 348-352, 94 S.Ct. 613, 620-622, 38 L.Ed.2d 561 (1974).

Here, the Minnesota Supreme Court has ruled that an invitee who is present and engaged in a common task with the leaseholder of the premises has a reasonable expectation of privacy protected under the Fourth Amendment. Failure to reverse this decision of the Minnesota Supreme Court will significantly expand the extent of a defendant's privacy interest and application of the exclusionary rule contrary to existing decisions of this Court. For example, if it is the relationship between a host and invitee as defined by the "common task" that the Minnesota Supreme Court deems socially important and controlling, would the drug dealer's privacy interest cease if either he or the resident left the premises for a short period of time and the other remained for the purpose of continuing the common goal? Likewise, what would be the reasoning for not extending a drug dealer's privacy interests to other areas of the residence such as bedrooms, storage areas or vehicles possessed by the resident if they were used to manufacture, store or transport drugs for illegal sale. Attempts by defendants to attain standing in similar factual situations have been denied. See, *United*

States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) (Defendant did not have standing to object to search of mother's residence where he stored stolen property); *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed. 633 (1980) (That defendant owned drugs that were in the purse of a female acquaintance did not have standing to object to the search of the purse); *Rakas v. Illinois*, supra, 439 U.S.128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (Occupants of a motor vehicle who have no proprietary or possessory rights in the motor vehicle have no standing to contest a search of the glove compartment); and *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973) (Defendants who were not present at time of search of coconspirator's store had no standing to contest the search as they had no proprietary or possessory interest in the store.).

In attempting to apply the Minnesota Supreme Court's holding to future cases, courts will have difficulty finding a case in which the application of the exclusionary rule is not a possibility. Virtually everyone who is invited into a residence does so for the purpose of engaging in a common task with the resident. Those invited into a residence to stay overnight, to visit, to attend social functions or to engage in business transactions are all engaging in a common task with the resident. Under the Minnesota Supreme Court's holding, a drug dealer who is invited into a residence would have a constitutionally protected privacy interest in the premises by virtue of negotiation with the resident over the sale and purchase of illegal drugs. Such a privacy interest would exist even if negotiations for the illegal sale occurred in the entryway of the residence for only for a brief period of time. The practical effect of the Minnesota Supreme Court's ruling is to provide automatic standing to invitees in the premises of third parties.

In excluding potentially probative evidence to protect constitutional principles, this Court has had misgivings as to

the benefit of enlarging the class who may invoke the exclusionary rule:

> [T]he exclusionary rule "has been restricted to those areas where its remedial objectives are most efficaciously served." *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974). The Court has acknowledged that the suppression of probative evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case. E.g., *Rakas v. Illinois*, supra, 439 U.S., at 137-138, 99 S.Ct., at 427-28; *United States v. Ceccolini*, 435 U.S. 268, 275-279, 98 S.Ct. 1054, 1059-61, 55 L.Ed.2d 268 (1978); *Stone v. Powell*, 428 U.S. 465, 489-491, 96 S.Ct. 3037, 3050-3051, 49 L.Ed.2d 1067 (1976); see, *Michigan v. Tucker*, 417 U.S. 433, 450-451, 94 S.Ct. 2357, 2367, 41 L.Ed.2d 182 (1974). Our cases have consistently recognized that an unbending application of the exclusionary sanction to enforce ideals of government rectitude would impede unacceptably the truth-finding functions of the judge and jury. E.g., *Stone v. Powell*, supra, 428 U.S. at 485-489, 96 S.Ct., at 3048-3050; *United States v. Calandra*, supra, 414 U.S., at 348, 94 S.Ct., at 620. After all, it is the defendant, and not the constable, who stands trial.

United States v. Payner, 447 U.S. 727, 734, 100 S.Ct. 2439, 2445-2446, 65 L.Ed.2d 468 (1980).

Respondents have failed to demonstrate that application of the exclusionary rule as suggested in the instant case is necessary to curtail unlawful police conduct. Respondents have not identified any abuse of police power. The government will still risk the possible exclusion of evidence

in cases involving residents, overnight guests or other invitees who can identify a legitimate privacy interest in the premises under the totality of the circumstances. It is important that the application of exclusionary rule be based upon principles which are consistent with the fundamental purposes of the Fourth Amendment. Society's expectations, life experiences, reason and common sense must be considered. It is only upon such consideration that society's confidence and acceptance of our system of justice will prosper. Affirming the decision of the Minnesota Supreme Court in this case will erode public confidence in our system of justice and generate disrespect for the law by inappropriately expanding the exclusionary rule in countless cases.

II. AN OFFICER'S NON-ENHANCED USE OF HIS NATURAL SENSES TO OBSERVE CRIMINAL ACTIVITY IN A RESIDENCE FROM A COMMON AREA OUTSIDE THE CURTILAGE OF A RESIDENCE IS NOT A SEARCH UNDER THE FOURTH AMENDMENT.

In the instant case investigating officers obtained search warrants for the vehicle and apartment. Respondents challenge whether the information contained in the supporting affidavits was obtained in violation of their constitutional rights. In *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), it was decided that the use of listening devices and other artificial means to enhance one's natural senses may violate the defendant's legitimate expectation of privacy even though the interception or observation occurs in a public place. However, this Court has explained: "What a person knowingly exposes to the public, even in his own home or office, is not subject of a Fourth Amendment protection." *Id.*, 389 U.S. at 351, 88 S.Ct. at 511, 19 L.Ed.2d

576 (1967). As a result this Court has consistently held that non-enhanced observations from areas outside the curtilage of a residence are not searches under the Fourth Amendment even though the officers may have taken extraordinary steps to gain a vantage point from which their observations were made. *Florida v. Riley*, 488 U.S. 445, 449, 109 S.Ct. 693, 696, 102 L.Ed.2d 835(1989)(officer's observation, with his naked eye, of interior of partially covered greenhouse in residential backyard from helicopter circling 400 feet above did not constitute a search); *United States v. Dunn*, 480 U.S. 294, 303-304, 107 S.Ct. 1134, 1140-1141, 94 L.Ed.2d 326 (1987) (warrantless observation into a barn outside the curtilage of a residence used to illegally manufacture controlled substances is not a search under the Fourth Amendment); and *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986)(warrantless aerial observation, with naked eye, of fenced-in backyard within the curtilage of a home was not a search).

The Minnesota Supreme Court deemed irrelevant whether Officer Thielen's observations were made from a common area outside the curtilage of the apartment, because it found that the facts that he had left the sidewalk, walked across the grass, climbed over some bushes to a location within 12 to eighteen inches from the window and peered into the apartment through a gap in the blinds constituted such "extraordinary measures" that this alone made the search unreasonable under the Fourth Amendment. Not only was the Minnesota Supreme Court mistaken in its recitation of the facts in this case,[6] the conduct of Officer Thielen was

[6] The record indicates that Officer Thielen never walked on the sidewalk or climbed over bushes in order to look into the window. The record indicates that Officer Thielen approached the window from the west side which is opposite of the sidewalk. Nor was it necessary to climb over or walk around the bushes to get to the observation point. (Transcript

significantly less intrusive than that engaged in by investigating officers in *United States v. Dunn*, 480 U.S. 294, 303-304, 107 S.Ct. 1134, 1140-1141, 94 L.Ed.2d 326 (1987). In *Dunn* law enforcement officers had information that defendant's barn was being used as a location in which drugs were being illegally manufactured. Upon entering the ranch where the barn was located, officers climbed over two barbed wire fences and three wooden fences which surrounded the barn. The officers walked under the barn's overhang to a locked wooden gate and, by shining a flashlight through a netting on top of the gates, were able to see into the barn and observe a phenylacetone laboratory. This Court, accepting for the sake of argument that the defendant enjoyed a legitimate expectation of privacy in the barn, determined that no constitutional violation had occurred:

> As previously mentioned the officers never entered the barn, nor did they enter any other structure on respondent's premises. Once at their vantage point, they merely stood, outside the curtilage of the house and in the open fields upon which the barn was constructed, and peered into the barn's open front. And, standing as they were in the open fields, the Constitution did not forbid them to observe the phenylacetone laboratory located in respondent's barn. This conclusion flows naturally from our previous decisions.

Id., 480 U.S. at 304, 107 S.Ct. at 1141, 94 L.Ed.2d 326 (1987). The Court also thought it was irrelevant that the actions of the police were for the sole purpose of ascertaining

of Omnibus Hearing, J.A., infra, pp. G44-G45 and Exhibits 8 -13, J.A. infra., pp. I1-I7)

whether or not drug activity was present. *Id.*, 480 U.S. at 304-305, 107 S.Ct. 1141, 94 L.Ed.2d 326 (1987).

Here, the Minnesota Supreme Court believed Officer Thielen had taken "extraordinary measures" in approaching and peering through a gap in the blinds. However, such a position ignores the fact that Officer Thielen at the time of his observation was standing on a grass area in the front of a multiple occupancy building. (Exhibits 8-13)(J.A., infra, p. I1-I7) It ignores the fact that Officer Thielen was initially told by a concerned citizen that he could observe the drug activity through the window. (J.A., infra, pp. G7-G-9) It ignores Officer Thielen's testimony that it was common for him to observe tenants and their guests playing in the area where the observations were made from. (J.A., infra, p. G32) It ignores the fact that tenants/guests would lean bicycles against the wall near the window. (Exhibit 11)(J.A., infra, pp. I4) It ignores the fact that Officer Thielen made his observations at dusk from a position that could easily be seen from across the front lawn. (Exhibit 10)(J.A., infra, p. I3) Finally, the Minnesota Supreme Court declared irrelevant the trial court's finding that the area from which the officer's observation was made was common to other tenants. *Carter*, supra, 569 N.W.2d at 178 (1997) (J.A., infra, p. A22).

The Minnesota Supreme Court in its ruling established a standard which wrongfully focuses primarily upon the methods the officer used to reach his vantage point, rather than upon the location from which the officer's observations were made. It is clear that this Court has chosen to focus its attention concerning whether a search occurred under the Fourth Amendment upon the location from which the officer's observations were made and not on the methods the officer used to reach his/her vantage point. See, *Florida v. Riley*, 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989); *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326

(1987); and *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

Additionally, the proper inquiry does not rest upon whether the officer has positioned himself in a location not normally accessible to the public, but rather upon whether the location is an "open field" or a common area. Clearly in *Dunn*, supra, the public would not have been normally expected to enter the defendant's ranch, climb over barbed wire and wooden fences and shine a flashlight into the door of a barn to observe what was inside. Nor would one expect the general public to secure a helicopter or plane to fly 400 to 1,000 feet above defendant's backyard to photograph marijuana growing operations as occurred in *Riley* and *Ciraolo*. Yet, in each one of these factual scenarios this Court determined that actions of the officers did not constitute a search under the Fourth Amendment, as the observations were made from a location where the defendant had no constitutionally protected privacy interest.[7]

The decision of the Minnesota Supreme Court has the further potential of having courts in future cases focusing on what physical acts the defendant took to keep third parties from observing his or her illegal activities rather than upon the location from which the observation was made. For example, is the defendant afforded greater protection because he built an eight foot high privacy fence around his backyard marijuana growing operation than the defendant who erected only a five foot high privacy fence? An officer walking by would have to take the extraordinary step of obtaining a ladder or similar equipment to observe the illegal activity in

[7] The Court has also determined that no unreasonable search occurs when the officers have used electronic devices to assist their natural senses in observing defendant's activities where there existed no legitimate expectation of privacy. See, *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983)

the former, while in the latter scenario the illegal activity could be observed without any assistance. Does a defendant who chooses to engage in activity on the fourth floor of an apartment building receive greater constitutional protections than the ground floor defendant simply because the officer has to undertake additional acts to place himself in a vantage point from which he can see into the fourth floor apartment? The test should not be on how well an individual concealed his or her unlawful activity but whether the officer's location at the time of the intrusion is in a common or public area outside the curtilage of the residence and whether or not the officer used sophisticated surveillance devices not generally available to the public. *Florida v. Riley*, 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1988); *United States v. Dunn*, 480 U.S. 294 107 S.Ct. 1134 94 L.Ed.2d 326 (1987); *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed. 210 (1986); *Dow Chemical Company v. United States*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986); *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984); and *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). If the observation is made from a location in a common area outside the curtilage without the use of sophisticated surveillance devices, there is no search under the Fourth Amendment. Clearly, such was the case here. Officer Thielen's observations were made from a common area outside the curtilage of the apartment using nothing more than his plain eyesight.

If this Court were to change its primary focus from the location where the officer made his non-enhanced observations to the physical acts the officer took to place himself in a position to make the observation, a significant expansion of the exclusionary rule to criminal cases will occur. Factual situations in which the lower courts may find extraordinary measures were taken by an officer in obtaining his/her vantage point for observations are boundless. What

may constitute extraordinary acts to one may not be extraordinary to another. Probative evidence may be lost because one officer climbed on top on some nearby boxes to look over a fence while another did not. As this Court has explained:

> Application of the [exclusionary] rule deflects the truth finding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through nurturing respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.

Stone v. Powell, 428 U.S. 465, 490, 96 S.Ct. 3037, 3050-3051, 49 L.Ed.2d 1067 (1976). The position asserted by the respondents and the majority Minnesota Supreme Court will result in indiscriminate application of the Fourth Amendment and the exclusionary rule to the detriment of society's interests in seeking justice. Decisions that lack reason and common sense will erode society's confidence in our system of justice. Therefore, the Minnesota Supreme Court's analysis, which opens the door to varying degrees of privacy interests dependent upon the methods an officer used to gain a position from which observations may be made, should be rejected.

CONCLUSION

Respondents have not proven they have standing under the Fourth Amendment to object to the observations of Officer Thielen which formed the basis for obtaining a search warrant. The observations of Officer Thielen were not a search prohibited under the Fourth Amendment. Consequently, the decision of the Minnesota Supreme Court must be reversed.

Respectfully submitted,

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